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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARK KNAUST, BARBARA KNAUST and HERMAN KARL KNAUST, II,

Petitioners,

v.

THE CITY OF KINGSTON, NEW YORK, THE CITY OF KINGSTON PLANNING BOARD, THE CITY OF KINGSTON LOCAL DEVELOPMENT CORPORATION and THE UNITED STATES DEPARTMENT OF COMMERCE, FOR AND THROUGH THE ECONOMIC DEVELOPMENT ADMINISTRATION, WILBUR F. HAWKINS, DEPUTY ASSISTANT SECRETARY FOR ECONOMIC DEVELOPMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal agency place its failure to obey the National Environmental Policy Act beyond judicial redress simply by spending all federal funds for a project while a motion for a preliminary injunction against the funding is pending?

2. When a federal agency is presented with scientific evidence that the integrity of a water supply is threatened by a project it is funding, is not the federal agency obliged to prepare an environmental impact statement before proceeding?

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Petitioners, Mark Knaust, Barbara Knaust and Herman Karl Knaust, II, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dismissing their appeal as moot and vacating an Order of the United States District Court for the Northern District of New York which denied the Knausts' Motion for a Preliminary Injunction and Motion for Partial Summary Judgment and granted Respondents' Cross Motion for Summary Judgment under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370.

OPINIONS BELOW

The Second Circuit Opinion, reported at 157 F.3d 86 (2d Cir. 1998), is reprinted as Appendix A. The prior opinion of the United States District Court for the Northern District of New York which was vacated by the Second Circuit is reported at 978 F. Supp. 86 (N.D.N.Y. 1997), and set forth as Appendix B. A timely petition for rehearing was denied on December 21, 1998, in an order reprinted as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Second Circuit was initially entered on September 4, 1998. A timely petition for rehearing was denied on December 21, 1998. This Court has jurisdiction under 28 U.S.C § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the bedrock federal environmental statute, the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370, and the applicable regulations at 40 C.F.R. §§ 1501, *et seq.*, which require the preparation of an

environmental impact statement ("EIS") prior to proceeding with major federal action. The heart of NEPA, 42 U.S.C. § 4332(2)(c), is set forth as Appendix D.

STATEMENT OF THE CASE

The Knaust family owns certain unique and extremely valuable improved real property located in the City of Kingston, New York. The Knaust family property (hereinafter the "Property") is several acres in size, and includes significant subterranean space, a portion of which has come to be known as the Kingston Mines, and a series of subterranean lakes, sometimes known as the Knaust Lakes. The Property proved its value as a capital asset for decades when the Knaust family had operated from within the Kingston Mines the largest commercial specialty mushroom farm in the world. Since the nearly 60,000 square foot primary growing room is located underground, the Knaust family had improved the underground space with large concrete block walls, and a humidification system dependent upon the natural purity and abundance of the waters in the Knaust Lakes.

In July 1995, the Kingston Local Development Corporation (hereinafter "KLDC") purchased an option on undeveloped forest land located topographically above and adjacent to the Kingston Mines to facilitate development of what has become known as the "Kingston Business Park." The City defendants acquired federal financial assistance for the Kingston Business Park in the form of a $1.8 million dollar grant from the United States Department of Commerce, Economic Development Administration ("EDA"), largely to construct infrastructure, including a storm sewer that directed all road and factory runoff into a hole in the ground above the Knaust property. Significantly, when the Knaust's

commenced the present action in the United District Court for the Northern District of New York seeking "injunctive and declaratory" relief ordering the EDA to "prepare and circulate for comment a detailed environmental impact statement," this option had not been exercised, and the Kingston defendants had yet to perfect their ownership interest in the 107 acre parcel. Moreover, the option remained unexercised as of April 26, 1996, the date the Knausts moved for a preliminary injunction "enjoining the defendants from taking any action in furtherance of the development of the Kingston Business Park."

Prior to finalizing the grant, the federal defendants caused to be prepared an Environmental Assessment (hereinafter the "EA"). Based upon the minimal information collected for this "check-the-box" review, the EDA prepared a five page EA, and a one page "Finding of No Significant Impact" (hereinafter "FONSI"), concluding that "the preparation of an Environmental Impact Statement ("EIS") is not required."

The Knaust family commissioned one of the nation's most renowned expert engineers regarding stormwater pollution and control devices, Jonathan Jones, and presented the agency with his opinion that, *inter alia*, the EDA did a woefully inadequate job of defining the impacts of the stormwater runoff on existing groundwater resources and further, that the stormwater management plan accepted by the city will not result in significant removal of pollutants.

The Knaust family also placed before the agency geologic and hydrogeologic data collected by an experienced and widely published scientist, Paul Rubin. Mr. Rubin concluded, based upon over one hundred hours of field observations, that there is a significant probability that the stormwater

discharge points on the Kingston Business Park will enter the Knaust Lakes rapidly through bedrock cracks below the hole to which the sewer is engineered. The Kingston defendants ignored this substantial scientific evidence and moved forward with the project.[1]

Pressed with a bureaucratic dilemma to spend or lose the $1.8 million dollar grant, the EDA announced without public review, that it would stand by the FONSI and not risk the delay of an EIS, even in the face of the Rubin and Jones data. The Knaust family sued the next day, April 15, 1996.

On or about April 29, 1996, the Knaust family moved for a preliminary injunction "enjoining the defendants from taking any action in furtherance of the development of the Kingston Business Park" pending the performance by the EDA of a full EIS.

The Knausts' motion for preliminary injunctive relief went undecided until October 10, 1997. In the intervening seventeen months, the EDA marched ahead and disbursed all of the funds that it had designated for the Kingston Business Park sewer and other structures. With the funds in hand, and with no decision on the Knausts' motion for preliminary relief, the Kingston defendants rushed the project to completion, and the environmental impacts resulting from this "major federal action" remain unanalyzed.

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1. In response to the Knaust family's opposition, and in recognition of the cursory nature of their earlier environmental review, the EDA caused to be prepared a Supplemental EA. Although somewhat more substantial in terms of size, the Supplemental EA contained little if any supplemental analysis, and instead, illegally deferred to the findings prepared solely by the Kingston defendants.

THE DECISIONS BELOW

The district court simply deferred to the EDA's decision to not perform an EIS even though, as an economic agency, the EDA has no expertise and retained none to evaluate the Rubin Report.

The court below managed to decide the Knausts' NEPA claim without even citing a NEPA case. It found the controversy moot because the sewer was built while the case was pending. Several of the Circuit Courts of Appeals that have confronted mootness have refused to be trapped like the court below in a common law application of the mootness doctrine in NEPA cases, recognizing the need to uphold the rule of law and the unique role that NEPA plays in the nation's environmental regulatory infrastructure.

REASONS FOR GRANTING THE WRIT

I.

REVIEW BY THIS COURT IS WARRANTED BECAUSE THERE IS A SPLIT IN THE CIRCUITS AND THE ISSUES ARE IMPORTANT

The Second Circuit decision in this matter directly conflicts with the NEPA decisions of the United States Courts of Appeals for the Sixth, Seventh, Ninth and Tenth Circuits, each of which has stated that federal action in violation of NEPA does not become moot by completion of the very illegal conduct at issue. *See Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995) (passage of final rule does not eliminate the issue of whether Respondent improperly took steps to implement that rule), *cert. denied*, 515 U.S. 1159 (1996); *Van Abbema*

v. Fornell, 807 F.2d 633, 636-637 (7th Cir. 1986) (recognizing availability of post-construction relief including dismantling or alteration of offending facility or imposition of conditions upon its operation); *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980) (holding action challenging already completed sale of airport not moot where the actions could be "undone"), *cert. denied*, 450 U.S. 965 (1981); and *Airport Neighbors Alliance v. Pena*, 90 F.3d 426 (10th Cir. 1996) (finding case not moot because Court could order that runway be closed or impose restrictions on its use until Respondent complied with NEPA). *Accord Columbia Basin Land Protection Ass'n. v. Schlesinger*, 643 F.2d 585, 591 n.1 (9th Cir. 1981) (recognizing danger in allowing Agencies to "hide behind the mootness doctrine"); *National Parks and Conservation Ass'n. v. F.A.A.*, 998 F.2d 1523, 1524 n.3 (10th Cir. 1993) (finding case challenging airport construction not moot after construction where restrictions could be placed on the use of the airport).[2]

In *Kelley*, *supra*, landowners challenged the Nuclear Regulatory Commission's proposed rule approving the use of certain storage casks for nuclear waste. While the case was pending, the rule became final and the NRC began using the casks. Rejecting defendant's claim that passage of the final rule and use of the casks rendered moot plaintiffs' NEPA claims, the Sixth Circuit observed that the plaintiffs claim could not be made non-justiciable by the defendant's own advancing steps. *Id.* at 1509 *citing Porter v. Lee*, 328 U.S.

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2. The court below ignored the general teachings of this Court's decision in *TVA v. Hill*, 437 U.S. 153, 188, n.34 (1978). (Enjoining completion of the Tellico Dam after years of construction and over $58 million in public expenditures to enforce the Endangered Species Act, citing an earlier injunction in the case under NEPA to the same effect with approval.)

246, 251-152 (1946) (finding action to restrain tenant's eviction not moot by reason of tenant's eviction of premises). Understanding that mootness can never be used to undermine the rule of law, the Sixth Circuit ruled that if review is avoided, "respondents would have been allowed to circumvent the procedural rules with which petitioners argue they must comply." *Kelley*, 42 F.3d at 1509.[3]

Similarly, *Burbank, supra* addressed the issue whether construction of an airport runway rendered moot plaintiff's claims of non-compliance with NEPA in the construction. Appellees contended, as do respondents here, that because the federal funds supporting the project had been disbursed, and title to the airport property transferred, that the case was moot.[4] The Ninth Circuit took a broad view of its remedial powers, and held that so long as the "actions . . . can be undone," adequate relief is available, and the case presents a live controversy. *Burbank*, 623 F.2d at 116. The Ninth Circuit held to this view in *Columbia Basin, supra*, where action to build utility towers was challenged. The court reasoned that

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3. Significantly, the court observed that suits alleging procedural harm are only rendered moot when the subject procedure is followed. Specifically, the court noted that had the NRC published a new rule using the procedures petitioners asserted were proper, the promulgation of that rule may have rendered the action moot. Failing that, the court interpreted the complaint as alleging a continuing harm caused by the use of the casks, and declared the controversy "live." *Kelley v. Selin*, 42 F.3d 1501, 1509 (6th Cir. 1995). This is precisely petitioners' position. The Second Circuit has rejected this sound analysis.

4. The Respondents' assertion that the EDA grant cannot be undone is belied by its own terms. The grant conditions state that the EDA may demand return of the grant if NEPA is violated.

> if the fact that the towers are built and operating were enough to make the case non-justiciable . . . the BPA (and all similar entities) could merely ignore the requirements of NEPA, build its structures before a case gets to court, and hide behind the mootness doctrine. Such a result is not acceptable.

Columbia Basin, 643 F.2d at 591-592 n.1.

Remarkably the court below clearly finds such bold violations acceptable, causing a wide chasm between the Circuits.

The Seventh Circuit relied upon the broad *Kelley/ Columbia Basin* view of appellate remedial powers in *Van Abbema*, *supra*. Plaintiffs challenged under NEPA a federal permit for transloading coal from trucks to barges on the Mississippi River. The Circuit rejected defendants' claim that construction of the facility removed the court's jurisdiction, holding

> if plaintiff . . . was to succeed in showing that the permit had to be revoked or modified, we presumably could order that the facility be dismantled, altered, or operated differently.

Van Abbema, 807 F.2d at 636-737.

In *Airport Neighbors, supra*, homeowners challenged a proposed upgrade of an airport runway, claiming that the EA and FONSI prepared by the federal proponents was inadequate. Construction of the runway was substantially completed at the time of the appeal. The Circuit found that

in the vast majority of cases "the court can provide some remedy if it is determined that an agency failed to comply with NEPA." *Airport Neighbors*, 90 F.3d at 429. Ultimately, the Court held that the issues pertaining to the enhanced use of the runway were still live, and presented a justiciable controversy. Here, the continued use of the sewer funded by the EDA presents a continuing dispute.

To be sure,

> Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.

O'Shea v. Littleton, 414 U.S. 488, 495-496 (1974). But this is not a case where the Respondent stepped beyond redress by compliance with the crux of a Congressional mandate. *See, e.g., Steel Company v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (EPCRA filings prior to suit deprive federal court of jurisdiction).[5] Here, the Respondent refuses to this day to comply with NEPA's mandate of an Environmental Impact Statement, and the sewer that Respondent funded continues to this day to threaten the integrity of the Knaust family's water supply.

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5. There is no question that the Knaust family has *statutory* standing under NEPA. Petitioners' are adjacent landowners with both economic and environmental interests in assuring that the impact of a federally funded sewer on their threatened fragile water supply is subjected to full environmental analysis.

II.

THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO ARTICULATE THE FEDERAL LAW OF ENVIRONMENTAL IMPACT ANALYSIS THAT MUST BE FOLLOWED BY FEDERAL AGENCIES

Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality. 42 U.S.C. § 4331. To ensure that this commitment is "infused into the ongoing programs and actions of the Federal Government, the act also establishes important "action-forcing procedures." 115 Cong. Rec. 40416 (remarks of Sen. Jackson).

As this Court has recognized, the statutory requirement that a federal agency contemplating major action prepare an environmental impact statement serves NEPA's "action-forcing" purpose in two important respects. *See Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983).

> It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision.

Robertson v. Methow Citizens Council, et al., 490 U.S. 332 (1989).

It is now well-settled that NEPA does not mandate particular results, but it clearly prescribes the necessary process of impact evaluation. *See Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-228 (1980) (per curiam). NEPA promotes its sweeping commitment to prevent or eliminate damage to the environment by focusing attention on the environmental effects of proposed agency action. *See* 42 U.S.C. § 4321. NEPA is intended to ensure that the agency will not act on incomplete information, "only to regret its decision after it is too late to correct." *Robertson v. Methow Citizens Council, et al.*, 490 U.S. 332, 349 (1989).

Federal action must be set aside under NEPA if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). A reviewing court must insure that the agency "has taken a 'hard look' at environmental consequences." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). Here, the detailed Rubin Report was presented to the agency. The Respondent EDA did not conduct any hydrogeologic review in response. It gathered no data. It retained no expert and, as an economic development agency, has no environmental expertise upon which to rely or defer. It did not determine the fate or impact of the sewer water on the Knaust lakes. Indeed, the EDA failed to even make a finding as to the impact of the sewer on the lakes. Instead, driven by a belated bureaucratic need to immediately 'spend or lose' the $1.8 million dollar grant, the EDA decided to build the sewer without preparing an environmental impact statement. No public review of their decision was afforded. This violation of federal law escaped review by the court below, beshrouded by a novel notion of mootness that fully rewards the EDA for violating NEPA expeditiously while the case was pending.

The decision below begs disregard of NEPA by federal agencies, encourages deliberate efforts to engineer mootness in the face of controversy and thus destabilizes the law which has served well as the bedrock of environmental law and policy for nearly thirty years.

This Court has not spoken on NEPA in over ten years. This case presents clear facts that illustrate how federal action that violates NEPA procedures can inflict harm upon owners of private property with unique environmental features and economic potential.

It is time to set another beacon by which the federal agencies and the federal courts may navigate the shoals of environmental review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED SEPTEMBER 4, 1998

Mark KNAUST, Barbara Knaust and Herman Karl Knaust, II, Plaintiffs-Appellants,

v.

THE CITY OF KINGSTON, New York, The City of Kingston Planning Board, The City of Kingston Local Development Corporation and The United States Department of Commerce, for and through the Economic Development Administration, Wilbur F. Hawkins, Deputy Assistant Secretary for Economic Development, Defendants-Appellees.

Docket 97-6287.

United States Court of Appeals,
Second Circuit.

Argued May 13, 1998.

Decided Sept. 4, 1998.

* * *

SHADUR, Senior District Judge.

Mark Knaust, Barbara Knaust and Herman Karl Knaust, II (collectively "Knausts") have taken an interlocutory appeal from the October 10, 1997 order of the United States District Court for the Northern District of New York (Frederick J.

Scullin, Jr., District Judge) that (1) denied Knausts' motion for a preliminary injunction, (2) denied Knausts' Fed.R.Civ.P. ("Rule") 56 motion for summary judgment on certain of their claims against the United States Department of Commerce ("Department") and (3) granted Department's cross-motion for summary judgment, dismissing all of Knausts' claims against Department. For the reasons set forth below, we dismiss the appeal as moot and vacate the district court's order.

Background Facts

On September 20, 1995 the Economic Development Administration, a Department agency, approved a $1,860,000 grant under the Public Works and Economic Development Act of 1965 as amended (42 U.S.C. §§ 3121-3137) to the City of Kingston, its Planning Board and its Local Development Corporation (collectively "Kingston Defendants") to provide partial funding for the construction of the Kingston Business Park ("Park") on a 107 acre parcel of property adjacent to and topographically above Knausts' property. Knausts opposed the project, arguing that it posed an imminent threat to the environment. More specifically, they maintained that Park's storm water system would contaminate a subterranean water source on their property and would thus interfere with their professed plans to revive an abandoned commercial mushroom farm operated on the property 30 years earlier.

On April 15, 1996 Knausts filed their Complaint that (1) charged Department with violations of the National Environmental Policy Act ("NEPA," 42 U.S.C. §§ 4321-

4370e) and the Coastal Zone Management Act (16 U.S.C. §§ 1451-1465), (2) asserted claims against Kingston Defendants for their alleged violations of 42 U.S.C. § 1983 and of New York environmental law and (3) advanced common law nuisance claims against all defendants. Knausts also sought temporary and preliminary injunctive relief to enjoin the federal funding and the Park's construction. One month later the district court denied Knausts' request for a temporary restraining order, leaving the request for preliminary injunctive relief still pending.

Next Knausts moved for summary judgment and a permanent injunction on their NEPA claim against Department, which in turn responded with its own Rule 56 motion seeking to dismiss all of the claims pending against it. During the 15 months that elapsed between those filings and their disposition, the construction of Park's infrastructure was completed and all federal funds allocated to the project were disbursed and expended.

On October 10, 1997 the district court entered the order described at the outset of this opinion, and this appeal ensued. Shortly before we heard oral argument Department and Kingston Defendants moved to dismiss the appeal on mootness grounds. Those motions were fully briefed and were consolidated with Knausts' interlocutory appeal.

Mootness

As a threshold jurisdictional matter, we must decide whether intervening events have rendered Knausts' request for injunctive relief moot, for "Article III of the Constitution

limits this Court to consideration of appeals involving a live case or controversy" (Agee v. Paramount Communications Inc., 114 F.3d 395, 398 (2d Cir.1997)). As Lewis v. Continental Bank Corp., 494 U.S. 472, 477-78, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (internal citations and quotation marks omitted) makes clear:

> This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed. . . . The parties must continue to have a personal stake in the outcome of the lawsuit.

It cannot be gainsaid that the preliminary injunction aspect of the case — the springboard for and sole subject of this appeal — no longer presents a live controversy and is therefore moot. As we said in Bank of New York Co. v. Northeast Bancorp, Inc., 9 F.3d 1065, 1067 (2d Cir.1993):

> In general, an appeal from the denial of a preliminary injunction is mooted by the occurrence of the action sought to be enjoined.[1]

Accord, Neighborhood Transp. Network, Inc. v. Pena, 42 F.3d 1169, 1172 (8th Cir.1994). That certainly is the case here: Park's construction was finished in July 1997, the final

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1. Nor is this a situation in which restoration of the status quo — a potential exception to the general rule of mootness mentioned (but not decided upon) in Bank of New York — is a feasible possibility.

disbursement of the federal funds was made in September of that year, and there are no pending applications for additional federal financing. Because this appeal thus seeks to enjoin the future occurrence of events that are already in the past, we lack appellate jurisdiction.

Our conclusion is strongly buttressed by CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc., 48 F.3d 618, 621 (1st Cir.1995), which confronted a similar factual scenario and also dismissed the appeal, stating in language that might well have been written for this case:

> No mandate that we might issue can turn back the pages of the calendar and either stop the commission of the allegedly infringing act or fully palliate its effects. Though federal courts possess great authority, they lack the power, once a bell has been rung, to unring it. In short, no justiciable controversy exists because this appeal can no longer serve the intended harm-preventing function, or, put another way, this court, within the isthmian confines of an interlocutory appeal from an order refusing to restrain a now completed act, has no effective relief to offer.

There are to be sure situations in which otherwise moot cases may nevertheless remain justiciable if they are "capable of repetition, yet evading review" (Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911)). But that long-recognized exception to mootness principles is severely circumscribed. As Spencer v. Kemna, __ U.S. __, __, 118 S.Ct. 978, 988, 140 L.Ed.2d 43 (1998) (internal

citations, quotation marks and brackets omitted) has reconfirmed earlier this year:

> The capable-of-repetition doctrine applies only in exceptional situations, where the following two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

Neither of those conditions is satisfied here. First, the elapsed time that gave rise to mootness here was simply a product of an extended delay before the district court ruled, not some inherent limitation on the time interval between the receipt of a grant award and the disbursement of funds that would necessarily inhibit judicial review. Moreover and independently, nothing has been shown to suggest any "reasonable expectation" that Knausts will confront any like situation in the future. Not only are there no pending applications by Kingston Defendants for additional federal funding, but no such applications are planned.

Nor will it suffice to hypothesize the possibility that at some future time, under circumstances that could only be guessed at now, the parties could theoretically become embroiled in a like controversy once again. As Murphy v. Hunt, 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982) (per curiam) teaches:

> The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the [capable of repetition, yet evading review] test. . . .

In sum, Knausts cannot stave off the required dismissal by invoking that limited exception to the established principles of mootness.

This disposition does not of course terminate the litigation. Knausts may still seek, and may perhaps be successful in obtaining, other relief for their claimed harms (a matter on which this Court suggests no position). But only as and when such other relief is granted or denied in a final appealable order will the case become ripe for proper appellate review.

Avoiding Mootness

Although we have thus resolved this appeal, the fact that we have had to do so without confronting its substantive merits constrains us to add some thoughts on the subject of the extended delay that has produced that outcome. We hasten to say that the record does not disclose (nor do we question) the reasons that the district court decision had such a long gestation period,[2] so what is said here is intended to address

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2. In that respect we have noted from the Administrative Office's annual Judicial Caseload Profile Report for the last complete fiscal year (ended September 30, 1997) that in the Northern District of New York — not surprisingly, given the existence of just five authorized judgeships coupled with the fact that at substantially all times during the five immediately preceding fiscal years there were either two or three unfilled vacancies, while the entire fiscal 1997 year reflected one unfilled vacancy:

1. As of last September 30 there were 650 pending cases per authorized judgeship (which, despite the voluntary

(Cont'd)

general considerations of timeliness rather than suggesting any case-specific problem.

District court calendar management is by its very nature a difficult undertaking. District court judges are compelled to deal with caseloads (a mix of both civil and criminal cases) numbering in the hundreds at any point in time. We recognize that such burdens are not readily controllable, because neither the demand (the number and complexity of case filings) nor the supply (the number of judges handling them) is determined by the judiciary itself. But despite such large caseloads, when problems of an emergent nature are presented to the federal judiciary, they must be responded to with whatever speed each situation may require. Inordinate delays must be shunned, particularly when litigants and their lawyers have such limited means for seeking relief in the face of an unexplained passage of time before a long-awaited decision is reached.

Although we are not in a position to evaluate the specific circumstances that may have occasioned the delay in this case,

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(Cont'd)

assumption of duties by two senior judges, represents a substantially higher average number for the four active judges). That number exceeds the national average for all district judges by nearly 40%.

2. Predictably the median time for bringing a civil case from filing to trial was then also about 40% higher than the national average, with the number of civil cases over three years old understandably being more than 80% higher than the national average.

it does exemplify the problem — a litigant attempts to obtain injunctive relief, the district court is delayed in reaching a decision on the injunction, and then the action sought to be enjoined is completed while the decision on the injunctive relief remains open. Such a sequence of events, combined with the mootness doctrine, thwarts any effort to have an ultimate adverse decision on the merits considered by a reviewing court. We therefore commend to our colleagues on the district court that they must decide preliminary motions promptly or establish procedures under which, if for any reason they themselves are unable to decide any motion for preliminary injunctive relief promptly, they will take the initiative to inquire of the litigants whether timeliness is a matter of concern so that they may then act accordingly.

Conclusion

Because the subject matter of this appeal no longer presents a live controversy, this Court lacks appellate jurisdiction to decide the matter. Accordingly we GRANT Department's and Kingston Defendants' respective motions to dismiss this appeal and therefore DISMISS the appeal as moot. We also VACATE the district court's order that is the subject of this appeal (see Great Western Sugar Co. v. Nelson, 442 U.S. 92, 99 S.Ct. 2149, 60 L.Ed.2d 735 (1979) (per curiam)), without prejudice to the district court's consideration of the renewed entry of an order consistent with this opinion.

APPENDIX B — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED OCTOBER 10, 1997

Mark KNAUST, Barbara Knaust and Herman Karl Knaust, II, Plaintiffs,

v.

THE CITY OF KINGSTON; The City of Kingston Planning Board; The City of Kingston Local Development Corporation; and The United States Department of Commerce, for and through the Economic Development Administration, Wilbur F. Hawkins, Deputy Assistant Secretary of Economic Development, Defendants.

No. 96-CV-601 (FJS).

United States District Court,
N.D. New York.

Oct. 10, 1997.

* * *

MEMORANDUM-DECISION AND ORDER

SCULLIN, District Judge:

Introduction

This environmental action arises out of the planning and construction of a business park on land adjacent to the

Plaintiffs' property in the City of Kingston. In their complaint, Plaintiffs assert (1) claims against the City of Kingston, City of Kingston Planning Board, and the City of Kingston Local Development Corporation (collectively the "Kingston Defendants") for alleged violations of the Takings Clause of the Fifth Amendment pursuant to 42 U.S.C. § 1983; (2) claims against the City of Kingston and City of Kingston Planning Board for alleged violations of the New York State Environmental Quality Review Act ("SEQRA"), New York Environmental Conservation Law 8-0101 et seq.; (3) claims against the Economic Development Administration ("EDA") for alleged violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 and 4322, and the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1456; and finally (4) common law nuisance claims against all of the Defendants.

Factual Background

Plaintiffs own a parcel of real property in Kingston, New York. The property contains a subterranean lake located within an abandoned limestone mine. From the 1930s to the 1960s, the Knaust family operated a large commercial mushroom farming operation in the mine using water from the lake. From the end of the 1960s to the present time, the Plaintiffs abandoned their farming operations. However, for the past several years, the family has been investigating the possibility of starting another commercial mushroom farming operation in the mine again using the water from the lake.

During the spring of 1995, the City of Kingston and the Kingston Planning Board negotiated a series of contracts and

agreements with a number of companies for the development and construction of a business park on a 107 acre parcel of property adjacent to the Knaust property. The business park will eventually be the site of a new manufacturing facility for Huck International, Inc. ("Huck"), a manufacturer of hand-held power tools and a major employer in the Kingston area.

On September 20, 1995, the Defendant EDA awarded a grant of $1.86 million dollars to help fund this project pursuant to the Public Works and Economic Development Act of 1965. See 42 U.S.C. §§ 3121 et seq.; 13 C.F.R. Part 308 (the Title IX Grant Program).[1] The EDA decided to award the grant after conducting two Environmental Assessments ("EAs") and finding that the project would have no significant impact on the environment as required by NEPA.[2]

Plaintiffs assert that the Defendants have failed to investigate the environmental impact of the proposed business park adequately. Plaintiffs maintain that the business park's storm water management system will not prevent petroleum based pollutants from seeping into Plaintiffs' lake because the system does not take into account the "karstic" (or porous) nature of the earth underlying the business park. Plaintiffs claim that the pollutants will create a nuisance and diminish the usefulness and commercial value of their property.

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1. The Title IX program is designed to assist economically stressed areas such as Kingston, which has lost thousands of jobs in recent years, partly as a result of reduced defense spending by the federal government.

2. The EDA's finding were based, in part, on two Environmental Impact Statements prepared by the Kingston LDC under New York's environmental protection laws.

Appendix B

Presently before the Court are (1) Plaintiffs' motion for a preliminary injunction enjoining the Defendants from taking further steps to fund, develop, or construct the Kingston Business Park, (2) Plaintiffs' motion for summary judgment on their NEPA claim against the EDA, and (3) EDA's cross-motion to dismiss all of Plaintiffs' claims pursuant to Fed. R. Civ. Pro. 12(b), or in the alternative for summary judgment as to each of these claims.

Discussion

I. EDA's Cross Motion to Dismiss and/or for Summary Judgment on Plaintiffs' Claims Against It for Violation of NEPA and CZMA

The Court will first address the EDA's cross-motion to dismiss and/or for summary judgment. In evaluating a motion to dismiss for failure to state a claim, the Court must "accept as true all the factual allegations in the complaint" and draw all reasonable inferences in favor of the plaintiff Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164, 113 S.Ct. 1160, 1161, 122 L.Ed.2d 517 (1993). The court will not dismiss the complaint for failure to state a claim " 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief' " Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir.1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)).

With respect to the summary judgment standard, the Court will grant summary judgment only if, despite

construing the facts in favor of the non-moving party, the moving party demonstrates that "no genuine issue as to any material fact" exists and that the undisputed facts entitle the moving party to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2551, 91 L.Ed.2d 265(1986). In order to avoid summary judgment, the non-moving party must support each element of its claims with specific facts set forth by affidavit or other evidence. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).

As stated, the Plaintiffs have asserted claims against the EDA for violation of NEPA and the CMZA.

A. NEPA

The EDA first argues that Plaintiffs lack standing to assert a NEPA claim. Alternatively, the EDA argues that it is entitled to summary judgment on Plaintiffs' NEPA claim because the EDA's decision to issue a Finding of No Significant Impact ("FONSI") was not arbitrary or capricious. The Court will address these arguments seriatim.

1. Standing

The EDA contends that the Plaintiffs lack standing to assert their NEPA claim because of the speculative nature of the alleged harm, and the fact that the Plaintiffs are concerned primarily about their economic interests — interests that do not fall within the "zone of interests" protected by NEPA. Plaintiffs, on the other hand, argue that their allegations of irreversible environmental injury are sufficient to establish standing under NEPA.

At a minimum, standing under Article III of the Constitution requires that a plaintiff suffer a concrete and particularized injury that is actual or imminent, not conjectural or hypothetical; a causal connection between the injury and the conduct at issue; and that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. See Defenders of Wildlife, 504 U.S. at 560-561, 112 S.Ct. at 2135-2136. In addition to meeting these requirements, Plaintiffs must also demonstrate that the interests they seek to protect fall within the "zone of interests" protected by the applicable statute.[3] Lujan v. National Wildlife Federation, 497 U.S. 871, 883, 110 S.Ct. 3177, 3185, 111 L.Ed.2d 695 (1990).

As stated, in this case Plaintiffs allege storm water runoff from the business park will contaminate the subterranean lake on Plaintiffs' property, and that this contamination will deny Plaintiffs of an economical use of their property. Plaintiffs argue that storm water runoff from the business park will contain pollutants that will not be filtered out by the business park's storm water management system. In addition, Plaintiffs allege that the ground underlying the park is "karstic" allowing the contaminated water to travel to the Knaust property. Moreover, upon reaching the Plaintiffs' property, the water will contain enough pollutants to contaminate the Knaust Lake.

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3. Because NEPA does not provide a private right of action, the Plaintiffs must proceed under § 10(a) of the Administrative Procedure Act ("APA"), which entitles a person to judicial review when the person is "adversely affected or aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702 (emphasis added).

If proven, these injuries would likely satisfy the "injury in fact" requirement of Article III. However, to conclude that such an injury is concrete rather than hypothetical, the Court must pile inference upon inference. In fact, Plaintiffs' plans for a mushroom farming operation do not even appear firm. While Plaintiffs' standing under Article III is tenuous, the Court cannot conclude as a matter of law that none exists.

Turning to the EDA's argument that Plaintiffs' claims do not fall within the "zone of interests" covered by NEPA, the Court must refer to the particular provision of law upon which the Plaintiffs rely, as opposed to, the overall purpose of the Act in question. Bennett v. Spear, __ U.S. __, __, 117 S.Ct. 1154, 1167, 137 L.Ed.2d 281 (1997). In this case, Plaintiffs allege that the EDA has failed to comply with section 4332(2)(c) of NEPA, which requires all federal agencies to prepare an detailed Environmental Impact Statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). However, economic injury does not, by itself, fall within NEPA's zone of interests. Sabine River Auth. v. United States Dep't of Interior, 951 F.2d 669, 676 (5th Cir.1992). Thus, to withstand a motion for summary judgment, the Plaintiffs must allege that the proposed business park threatens to impose such injury as to damage the recreational use, aesthetics, or environmental well-being of the Knaust property requiring the preparation of an EIS. See Goos v. Interstate Commerce Comm'n, 911 F.2d 1283, 1290 (1990). In this case, the Court is persuaded that the Plaintiffs' claims are primarily grounded in their concern that the business park will deprive them of the ability to operate a mushroom growing venture. Yet, because the Court must

draw all reasonable inferences in the Plaintiffs' favor, the Court finds that Plaintiffs' allegations of environmental injury are sufficient to establish standing under NEPA.

2. Merits of Plaintiffs' Underlying NEPA Claim

Turning to the merits of Plaintiffs' NEPA claims, Plaintiffs allege that the EDA's FONSI was arbitrary and capricious because the EDA failed to consider a number of the factors established by the Council on Environmental Quality ("CEQ").[4] Specifically, Plaintiffs allege that the EDA failed to consider (1) the unique characteristics of the geographic area, (2) whether the Kingston Business Park will irretrievably commit (or contaminate) natural resources located on the Knaust Property, and (3) whether the effects on the quality of the human environment are likely to be highly controversial. The EDA argues that the Administrative Record fully supports the EDA's FONSI. Moreover, the EDA argues that the Administrative Record specifically addresses the concerns raised by the Plaintiffs.

Purpose of NEPA/Standard

NEPA is designed to infuse environmental considerations into the Government's decision-making processes by requiring federal agencies to follow certain procedures. City of New York v. Department of Transp., 715 F.2d 732, 747-748 (2d Cir.1983). Although these procedures may affect

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4. The CEQ has established procedures to guide federal agencies in determining whether a proposed project will significantly impact the environment. 40 C.F.R. §§ 1500-17.

substantive decisions, NEPA does not mandate particular substantive outcomes. Pursuant to NEPA, the CEQ has promulgated regulations governing the procedures an agency must follow to ensure that environmental considerations are taken into account. Pursuant to those regulations, an agency must first prepare an Environmental Assessment (or ("EA")). The EA must include a list all agencies and persons consulted in the preparation of the EA, and brief discussions regarding the necessity for the proposal and the environmental impacts of alternative courses of action. 40 C.F.R. 1508.9(b). Based on the EA, the agency must then determine whether or not the proposed government action will significantly affect the quality of the human environment. If the agency determines that the proposed action will not have a significant impact, then the agency will complete its review by issuing a FONSI. 40 C.F.R. 1501.4. Alternatively, if the agency determines that the proposed agency action will have a significant impact on the quality of the human environment, then the agency must prepare a more detailed EIS.

The role of the courts in reviewing this process is simply to ensure that the relevant agency's decisions are not arbitrary or capricious. Baltimore Gas and Elec. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 98, 103 S.Ct. 2246, 2252, 76 L.Ed.2d 437 (1983). A reviewing court may not overturn an agency's determination and substitute its own judgment for that of the agency. Vermont Yankee Nuclear Power v. Natural Resources Defense Council, 435 U.S. 519, 558, 98 S.Ct. 1197, 1218, 55 L.Ed.2d 460 (1978).

Appendix B

Administrative Record

According to the Administrative Record submitted in this case, the EDA issued its first EA on August 17, 1995, finding that the proposed project was not controversial and did not significantly affect the quality of the human environment. Based on this first EA, the EDA concluded that an EIS was not necessary and recommended that a FONSI be issued. The EDA then awarded the Title IX grant to Kingston and KLDC. On February 7, 1996, the EDA received correspondence from the Plaintiffs alleging that the project posed an "imminent threat" to the environment. In response, the EDA suspended the grant award so it could conduct a Supplemental EA.

In preparing its Supplemental EA, EDA reviewed the reports submitted by the Plaintiffs as well as numerous comments submitted by other governmental agencies, including the Fish and Wildlife Service, the U.S. Farm Agency, and the New York Department of Environmental Conservation ("NYDEC"). Additionally, EDA twice sent its Regional Environmental Officer to Kingston to visit the proposed site and meet with the Plaintiffs. The EDA also welcomed any additional reports or documentation that the Plaintiffs wished to the agency to consider.

In its Supplemental EA, the EDA addressed each area of concern raised by the Plaintiffs. First, the EDA acknowledged that the proposed project would result in relatively permanent changes in land use, but concluded that none of the resources involved were limited in nature, and that their commitment would not be significant. The EDA also addressed the Plaintiffs' specific concern about water resources. As stated,

Plaintiffs argued that the business park's storm water system threatened to irretrievably and irreversibly commit natural resources by disposing pollutants into Plaintiffs' lake and surrounding aquifer. Plaintiffs base their claim, in part, on the opinion of hydrogeologist, Paul A. Rubin. Mr. Rubin asserts that the ground underlying the business park facilitates the rapid transmission of liquids through the earth because it is "karstic." However, also in the Administrative Record is a report by Charles Merguerian, P.h.D., Professor of Structural Geology at Hofstra University and President of Duke Geological Laboratory, which reaches the exact opposite conclusion.

Plaintiffs also rely heavily on an affidavit submitted by Jonathon Jones, a licensed engineer specializing in water management.[5] Jones questions the effectiveness of the proposed storm water runoff system based on the types of pollutants generally found in storm water runoff and a review of the storm water management report. However, NYDEC, the regulatory agency in New York State charged with protecting environmental quality, found that the plans for the storm water management plan were acceptable and substantially reduced the potential for groundwater contamination. Based on all the information available to it for its supplemental assessment, the EDA concluded that even if runoff from the proposed park entered the Knaust mine, it

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5. The Court notes that the EDA received Mr. Jones's affidavit after it made its FONSI determination. However, the Court finds that the affidavit does not contain any information that "presents a seriously different picture of the environment impact of the proposed project" that would require additional analysis by EDA. State of Wisconsin v. Weinberger, 745 F.2d 412, 421 (7th Cir.1984).

should not adversely impact the water quality in the mine. Despite these findings, the EDA even conditioned the grant award on a requirement that any company locating in the business park must construct spill containment areas around its loading dock areas to protect against accidental spills. As a result, EDA concluded that the proposed project did not pose a significant threat to the water resources located on the Knaust property.

As stated, Plaintiffs allege that EDA failed to evaluate the "unique characteristics" of the geographic area. Plaintiffs assert that the Knaust property is highly unique because it includes limestone mines modernized with an air management system that depends on the quality of the water drawn from the Knaust Lake. In response to Plaintiffs' concerns about the uniqueness of the property as a mushroom growing area, the EDA investigated the possibility of the land being prime or unique farmland. However, the EDA discovered that the area is currently zoned for one-family residences and that there were no applications for variances or proposals to reinitiate mushroom farming in the area. Moreover, the EDA contacted the United States Farm Service Agency, who advised EDA that the construction of the proposed business park Would not result in any loss of prime or unique agricultural land.

Plaintiffs' final complaint is that EDA failed to consider whether the effects on the quality of the human environment are likely to be highly controversial. As stated, according to the regulations promulgated by the CEQ, the degree to which the effects on the quality of the human environment are likely to be highly controversial is one factor that the agency should

consider when determining whether an action "significantly" impacts the human environment. 40 C.F.R. § 1508.27(b)(4). The term "controversial" refers to a substantial dispute as to the size, nature, or effect of the major federal action, not simply the level of neighborhood opposition that exits. Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir.1972). Throughout its Supplemental EA, the EDA acknowledges that some difference of opinion exists concerning the environmental effects of the proposed business park. Moreover, in the conclusion of its Supplemental EA, the EDA specifically states that the development of the business park at the proposed location is controversial. However, the EDA does not refer to the proposal as "highly" controversial. Moreover, even if the EDA determined that the effects of the proposed business park were "highly" controversial, that is but one factor in determining whether the project significantly impacts the human environment.

In addition to those concerns raised in Plaintiffs' brief, the Supplemental EA also addressed the effects of the proposed business park on floodplains and wetlands, vegetation and wildlife, endangered species, historic resources, wild and scenic rivers, ambient air quality, coastal zone management, and pollution prevention. Moreover, the EDA reviewed the alternative sites considered by the Kingston Defendants, alternative uses of the proposed site, and the "no action" alternative. Based on its analysis of all of the information available to it, the EDA acknowledged that the proposed business park would create adverse effects that some people may find unacceptable. However, the EDA determined that none of the adverse effects appear to have the potential to affect the quality of the human environment

significantly. Furthermore, the EDA concluded that economic opportunities created by the project outweighed any adverse effects. Therefore, the EDA determined that an EIS was not required and reaffirmed the grant award.

After thoroughly reviewing the Administrative Record, the Court finds that the EDA has adequately considered and disclosed the environmental effects of the business park. Therefore, the Court holds that the EDA's actions in this matter were not arbitrary or capricious as a matter of law. Accordingly, the Court grants EDA's cross-motion for summary judgment on Plaintiffs' NEPA claim against it and consequently denies the Plaintiffs' motion.

B. CZMA

The Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1456(d), forbids federal agencies from approving proposed projects that are inconsistent with a state's coastal zone management plan.[6] As stated, the EDA has moved for

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6. 16 U.S.C. § 1456(d) provides:

> "State and local governments submitting applications for Federal assistance under Federal programs, in or outside of the coastal zone, affecting any land or water use of natural resource of the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of section 6506 of Title

(Cont'd)

summary judgment on this claim. The Court will begin its analysis with the issue of standing.

1. Standing

The EDA argues that the Plaintiffs lack standing to bring their CZMA claim under the APA because the interest that the Plaintiffs seek to protect does not fall within the zone of interests protected by the CZMA. Specifically, the EDA alleges that the CZMA seeks to encourage and assist the states in their management of coastal zones and was not intended to protect the type of speculative economic interests of which the Plaintiffs complain.

Like NEPA, the CZMA does not provide a private right of action against the federal government for noncompliance. Rather, judicial review is made available only under § 10(a) of the APA. State of New York v. DeLyser, 759 F.Supp. 982, 986 (W.D.N.Y.1991). Therefore, Plaintiffs must meet the same standing requirements as discussed above.

As an initial matter, the Court could not find a single case in which an individual brought a claim challenging a federal agency's failure to obtain a consistency determination

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(Cont'd)

> 31. Federal agencies shall not approve proposed projects that are not consistent with the enforceable policies of a coastal state's management program, expect upon a finding by the Secretary that such project is consistent with the purposes of this chapter or necessary in the interest of national security."

pursuant to the CZMA.[7] Moreover, the Plaintiffs do not even assert that the APA is the basis for their CZMA claim in the complaint. However, even assuming the Court treats the Plaintiffs' CZMA claim under the APA, the Court again questions whether the Plaintiffs have demonstrated a concrete and particularized harm. Moreover, the relationship between the interest that Plaintiffs seek to protect and the CZMA's zone of interest is tenuous at best. Notwithstanding these concerns, the Court will proceed to address the issue of mootness.

2. Mootness

The EDA's second argument is that the Court should dismiss Plaintiffs' CZMA claim because the claim is moot. Specifically, the EDA alleges that it has fulfilled its statutory obligations by obtaining a statement from the New York Department of State ("NYDOS"), dated May 21, 1996, which provides that the Kingston Business Park is consistent with New York State's Coastal Management Plan ("CMP").[8]

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7. The Court finds that the CZMA, a grant-in-aid statute, was primarily intended to benefit the states and increase the states' ability to manage their coastlines. However, environmental groups have been granted standing to bring claims for violations of the CZMA. See State of California v. Watt, 683 F.2d 1253, 1296-1271 (9th Cir.1982), rev on other grounds sub nom., Secretary of the Interior v. California, 464 U.S. 312, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984). Although environmental groups are not necessarily the intended beneficiaries of the CZMA, they are more likely to have standing because of their shared interest in the preservation of coastal areas.

8. NYDOS is the agency designated to implement the New York State CMP.

Appendix B

To comply with 16 U.S.C. § 1456(d), a Federal agency must obtain a consistency determination from the appropriate state agency 90 days before final approval of a major Federal activity declaring that the proposed project is consistent with the state's coastal management program. Here, EDA issued its first EA and FONSI with the stipulation that disbursement of the grant was conditioned upon the receipt of evidence showing that the proposed project was consistent with New York's coastal zone management plan. Prior to issuing its Supplemental EA, the Kingston Urban Cultural Park Commission, acting as the Waterfront Consistency Review Board, found that the proposed project was consistent with the Local Waterfront Revitalization Program. Finally, on May 21, 1996, NYDOS determined that the proposed project would advance New York State's CMP as expressed in the City of Kingston's approved Local Waterfront Revitalization Program.[9] Therefore, the Court finds that Plaintiffs' CZMA claim is moot, and grants the EDA's cross-motion to dismiss the claim.[10]

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9. The Court notes that EDA did not obtain a consistency determination until after it issued its Supplemental EA. This violates the spirit 15 C.F.R. § 930.34, which requires agencies to provide the consistency determination to State agencies at least 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to an alternative notification schedule. However, Plaintiffs do not allege any harm resulting from EDA's delay, and the state did not lodge any protest in this case.

10. Moreover, the Plaintiffs seek injunctive and declaratory relief directing the Department of Commerce to disapprove the Kingston Business Park project as being inconsistent with the New York State CMP. Because the CZMA is only a procedural statute, the Court may not require the agency to reach a particular outcome.

C. Common Law Nuisance

Finally, the EDA moves to dismiss Plaintiffs' common law nuisance claim. EDA asserts that the Court should dismiss the claim because the United States has not waived its sovereign immunity, and the Plaintiffs have failed to set forth a basis for subject matter jurisdiction.

It is well settled that the federal government cannot be held liable in tort for the discretionary acts of its employees in the absence of a waiver. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687-688, 69 S.Ct. 1457, 1460-1461, 93 L.Ed. 1628 (1949). Here, the EDA's decision to award a Title IX grant was discretionary in nature, and the Plaintiffs have not alleged that the federal government has waived its sovereign immunity. Therefore, the Court lacks subject matter jurisdiction over the plaintiffs' common law nuisance claim and grants the EDA's motion to dismiss the claim.

II. Preliminary Injunction

Remaining in this action are Plaintiffs' claims against the Kingston Defendants for violation of the Takings Clause of the Fifth Amendment, pursuant to 42 U.S.C. § 1983, SEQRA, and Plaintiffs' common law nuisance claims. Plaintiffs' claims are based on the assertion that storm water runoff containing pollutants from the Kingston Business Park will seep through the earth into the Plaintiffs' property causing irreparable harm to the Knaust Lake. To prevent the alleged harm, Plaintiffs move to enjoin the Kingston Defendants from any further construction of the business park during the pendency of this action.

Appendix B

A preliminary injunction is an extraordinary and drastic remedy for which plaintiffs carry a heavy burden of persuasion. See Borey v. National Union Fire Ins. Co., 934 F.2d 30, 33 (2d Cir.1991). To succeed on a motion for a preliminary injunction, the movant must demonstrate irreparable harm and either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 70 (2d Cir.1996) (quoting Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir.1979) (per curiam)).

A showing of "probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." Reuters Ltd. v. United Press Int'l., Inc., 903 F.2d 904, 907 (2d Cir.1990) (internal quotations and citations omitted). "[A] mere possibility of irreparable harm is insufficient to justify the drastic remedy of a preliminary injunction." Borey, 934 F.2d at 34.

Here, Plaintiffs allege that further development of the Kingston Business Park will cause irreparable harm including pollution, degradation, contamination and destruction of the Knaust Lake, as well as the deprivation of all economically viable uses of the Knaust property.[11] In support of their allegations, Plaintiffs assert that Jonathon Jones's affidavit

11. As an initial matter, Plaintiffs allegations of economic harm cannot support their motion for a preliminary injunction because economic harm, by its very nature, is redressable with monetary damages. See Borey, 934 F.2d at 34.

establishes "beyond dispute" that storm water runoff will contain pollutants and contaminants, and that the affidavit of Mr. Rubin "indisputably establishes" that the storm water runoff will migrate to the Knaust property. As discussed above, Mr. Jones reviewed the storm water management plan on a conceptual level, and based his review on the types of pollutants generally found in storm water runoff and on a report prepared for the KLDC by professional engineers describing the storm water management system. In essence, Mr. Jones questioned the effectiveness of the storm water system to remove pollutants without having actually visited the site.

Also, Mr. Rubin states that the business park is underlain by a karst aquifer system which facilitates the rapid transmission of liquids into the earth. Based on his analysis, Mr. Rubin concluded that storm water runoff from the Kingston Business Park will be discharged to the karst aquifer and "most likely" into the Knaust Lake. (Rubin Aff. ¶ 24.)

The Defendants point to the testimony of Dr. Merguerian which directly refutes Mr. Rubin. After personally visiting the site, Dr. Merguerian emphatically states that the region is not karstic, and that the region experiences normal surface drainage. Dr. Merguerian also states that karstic features occur on a regional level and that he could find no professional geologist who has characterized the Kingston region as karstic. Moreover, the Defendants emphasize that NYDEC and other governmental agencies charged with protecting the environment approved the storm water management plans after carefully reviewing them.

Appendix B

After thoroughly reviewing all of the evidence submitted in this case, the Court finds that, at best, Plaintiffs have demonstrated that there is a "possibility" that storm water runoff from the Kingston Business Park will make its way into the Plaintiffs' lake. However, the speculative nature of the alleged harm in this case is clearly insufficient to justify the drastic remedy of a preliminary injunction.[12] Therefore, the Court denies Plaintiffs' motion for a preliminary injunction.[13]

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12. Moreover, even if storm water runoff polluted the Knaust Lake, it is difficult to see why the Plaintiffs could not be fully compensated with monetary damages. For example, the Plaintiffs could recover compensatory damages for any costs associated with removing pollutants from the lake.

13. Even if Plaintiffs suffered irreparable harm, the Court doubts whether the plaintiffs could satisfy the second prong of the preliminary injunction test. As an initial matter, with respect to all of Plaintiffs' remaining claims, the Court questions whether Plaintiffs have demonstrated the "injury in fact" necessary to assert standing. Moreover, each of Plaintiffs' claims appears to be insufficient on the merits. For example, Plaintiffs' Takings Clause claim will likely fail because the Plaintiffs have not demonstrated that there has been a physical invasion of their property, or that the Defendants' actions have deprived them of all economical use of their property. Plaintiffs' SEQRA claim will likely fail because the Kingston defendants seem to have fulfilled their requirement under SEQRA to take a "hard look" at the environmental impacts of the project. Finally, Plaintiffs' nuisance claim will likely fail because under New York Law, a landowner cannot be held liable for damages to adjoining property owners for the natural flow of surface water. Moreover, the balance of the hardships in this case tips decidedly in favor of the Defendants because the City of Kingston stands to lose a substantial revenue and over two hundred jobs if the Court grants the injunction; whereas, the Plaintiffs stand to lose only potential profits from a yet uncertain economic use of their property.

Appendix B

Conclusion –

Therefore, after carefully considering the allegations in the complaint, the papers submitted, and the arguments of counsel, it is hereby

ORDERED that Plaintiffs' motion for summary judgment is DENIED with respect to their NEPA claim; and it is further

ORDERED that EDA's cross-motion for summary judgment is GRANTED with respect to all of Plaintiffs' NEPA, CZMA, and common law nuisance claims against the EDA, and therefore all claims against the United States Department of Commerce are DISMISSED; and finally, it is further

ORDERED that Plaintiffs' motion for a preliminary injunction is DENIED.

The Plaintiffs are directed to initiate a telephone status conference on November 6, 1997 at 9:00 a.m.

IT IS SO ORDERED.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 21, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21 day of December one thousand nine hundred and ninety-eight.

Dkt No: 97-6287

Knaust

v

The City of Kingston

A petition for rehearing en banc having been filed herein by the appellants MARK KNAUST, BARBARA KNAUST and HERMAN KARL KNAUST, II,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

Appendix C

It is further noted that the petition for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX D — RELEVANT STATUTE

42 U.S.C. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Appendix D

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * * *

Supreme Court, U.S.
FILED
APR 22 1999
OFFICE OF THE CLERK

No. 98-1527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARK KNAUST, BARBARA KNAUST and HERMAN KARL KNAUST, II,

Petitioners,

v.

THE CITY OF KINGSTON, NEW YORK, THE CITY OF KINGSTON PLANNING BOARD, THE CITY OF KINGSTON LOCAL DEVELOPMENT CORPORATION and THE UNITED STATES DEPARTMENT OF COMMERCE, FOR AND THROUGH THE ECONOMIC DEVELOPMENT ADMINISTRATION, WILBUR F. HAWKINS, DEPUTY ASSISTANT SECRETARY FOR ECONOMIC DEVELOPMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR CITY OF KINGSTON RESPONDENTS

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QUESTIONS PRESENTED

1. May a Circuit Court of Appeals, in a case arising under the National Environmental Policy Act, ever find the case to be moot based on the facts and circumstances present at the time of appeal?

2. Where, upon a motion for preliminary injunction to halt the funding and construction of a business park, the factual allegations of "immediate and irreparable injury" are admittedly economic in nature and are sharply contested, may a District Court deny the motion?

Respondents also note that the Circuit Court did not address the second question proposed by petitioners.

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Respondents City of Kingston, City of Kingston Planning Board and Kingston Local Development Corporation (collectively, "the City") respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's opinion in this case.

Respondents adopt petitioners' statement of the Opinions Below, this Court's Jurisdiction and the relevant Statutory Provisions. Reference in this Brief to the Opinions Below will cite to pages as they appear in Appendices A and B to the Petition ("App. A" or "App. B").

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This action challenges the funding and construction of a Business Park in the City of Kingston, New York. As against the City, petitioners seek injunctive and monetary relief under 42 U.S.C. § 1983, contending that the Park's stormwater management system will pollute their vacant property near the Park, allegedly resulting in an unconstitutional "taking." As against the United States Department of Commerce, Economic Development Administration ("EDA"), petitioners challenge the decision to award an economic development grant to the City of $1.86 million for construction of Business Park infrastructure, as allegedly having been made in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*

In April, 1996, petitioners moved for a preliminary injunction to stop EDA and the City from further funding or development of the Business Park. Petitioners' moving papers asserted that the injunction was needed to protect their

"economic" or "business" interests. United States District Judge Scullin denied petitioners' request for a temporary restraining order, and cross-motions by petitioners and EDA for summary judgment on the NEPA claim followed.

In October, 1997, Judge Scullin denied petitioners' motion for summary judgment on the NEPA claim, granted EDA's cross motion and denied petitioners' motion for preliminary injunction. As to the latter motion, Judge Scullin found that the Knausts' allegations of "irreparable injury" from stormwater runoff were "economic" in nature and had been "directly refuted" by the City (App. B, pp. 28a-30a).

In September 1998, petitioners' appeal was dismissed as moot by the United States Court of Appeals, Second Circuit (Shadur, Senior District Judge) (App. A, pp. 1a-9a), on the ground that the Business Park had already been constructed and the EDA grant fully disbursed.

B. Facts

The City takes issue with much of petitioners' statement of the facts. Only those facts essential to the Court's consideration of the petition are set forth here. Based on these facts, the City respectfully urges that no injustice has been done which would require the exercise of this Court's jurisdiction. Petitioners retain claims for damages for the acts complained of, which are not affected by the rulings below. In addition, we assert that the facts of this case do not suggest the need for the Court to intervene to prevent harm to a statutory scheme. The petition should be denied.

1. *The Knaust Property.*

Petitioners own a three acre parcel of undeveloped property which includes a small portion of an abandoned underground mine. The major portion of the abandoned mine is under the City's Hasbrouck Park and the Business Park site and is owned by the City. Over the years, the mine has become partially flooded. A title search and survey conducted for the City reveal that petitioners have no recorded title to any portion of the flooded areas outside their portion of the mine.

Petitioners formerly ran a commercial mushroom farm on their property. They admit that this operation was abandoned over thirty (30) years ago; a fact noted by both the District Court (App. B, p. 11a) and Circuit Court (App. A, p. 2a). Petitioners' property is now in a residential zoning district, where farming is prohibited on parcels under five acres.

2. *The Kingston Business Park.*

Local and State agency approvals for the Business Park included public proceedings in compliance with the New York State Environmental Quality Review Act ("SEQRA"), N.Y. Environmental Conservation Law ("ECL"), Article 8. The SEQRA process included public review and comment upon Draft and Final Generic Environmental Impact Statements ("GEIS")[1] which discussed, among other things, the potential environmental impacts related to stormwater

1. SEQRA, the New York analog to NEPA, requires the preparation of an environmental impact statement for any publicly funded or approved project which "may" have a significant impact on the environment. ECL § 8-0109.

runoff and water quality. EDA included the Draft and Final GEIS's and the City Planning Board's final SEQRA Findings in its administrative record of the decision to award the economic development grant for the Park (App. B, p. 12a, n.2).

The City's determination to construct the Business Park arose from the need to find a new location for Huck International, Inc. ("Huck"), the City's largest manufacturing employer. Huck was not made a party to this action.

Work on the Business Park site began on May 7, 1996. By July 1996, significant portions of the Park's infrastructure and the Huck site had been completed. Beginning in August, 1996, Huck, pursuant to a long-term lease with the City, constructed a new manufacturing facility and moved its employees and operations into the Park. The Park's stormwater treatment system was completed in December 1996. All construction on Phase I of the Business Park was completed in July 1997.

The last funds under the EDA grant were disbursed to the City in September 1997. The City has no applications before EDA for additional federal funding of the Business Park, and none are planned.

Stormwater runoff from the Business Park consists of precipitation flowing from building roofs, paved areas of the parking lot and access road and landscaped and wooded areas. Stormwater passes into open grates fitted with vapor traps and deep sumps to remove contaminants and sediment; then to two 5,000 gallon "Vortechs" units for a second level of treatment to remove heavy metals, nutrients, hydrocarbons, and oil. From the "Vortechs" units, treated stormwater is

conveyed to an abandoned quarry on the Business Park property[2], and then into an existing surface drainage swale.[3]

This treatment system has been approved by federal and state regulatory agencies. In March, 1996, the New York Department of Environmental Conservation ("DEC") indicated that the system "adequately addresses this Department's concerns regarding potential groundwater contamination," and described the Park stormwater as presenting "no greater contamination threat than . . . a shopping center." The City has voluntarily elected to subject itself to the requirements of DEC's General Permit No. GP-93-06 for Storm Water Discharges.[4] The US Environmental Protection Agency ("EPA") determined in May, 1996 that this system was not subject to federal regulation as an "underground injection well."

---

2. The petition implies (pp. 2-4) that this quarry is directly above the Knaust property. In fact, the record shows that the quarry is 1600' feet (more than a quarter mile) north of petitioners' property.

3. It will be virtually impossible for chemical products used at Huck to enter this stormwater treatment system. As required by EDA (App. B, p. 21a), the loading dock at the Huck facility is equipped with a closed spill-containment system and a 1,000 gallon holding tank, and there are no internal floor drains or discharge points inside the Huck facility.

4. The General Permit was issued by DEC pursuant to the authority of § 402 of the Federal Clean Water Act, as delegated to the State by the U.S. Environmental Protection Agency. Part II of the General Permit prohibits any discharges that would violate New York water quality standards, cause an "increase in turbidity," or that contain "suspended solids, residue from oil and floating substances; visible oil film; globules; or grease."

3. *The Rubin Report and the City's Response.*

Petitioners' claims are dependent upon a characterization of the regional geology by Paul Rubin which is at odds with all other evidence in the administrative record. Mr. Rubin asserts that the geology in the area of the Business Park is "karst" topography, that the Business Park site and petitioners' property are "hydraulically connected," and that treated stormwater from the Business Park may travel through unidentified subsurface channels and enter petitioners' limited area of the abandoned mine.

Mr. Rubin's report was reviewed by the City's contractors. Their response is critical of Mr. Rubin's findings and refutes his theories regarding a "hydraulic connection" between the Park site and petitioners' property. Geologic reports prepared for the City in 1973 and 1995 make no mention of "karst" topography in the region or at the Business Park site.

4. *The Jones Letter.*

Petitioners also relied on a letter from Jonathan Jones criticizing the Business Park stormwater treatment system. Mr. Jones admits that he conducted only a "conceptual-level review" of urban stormwater issues and provided "generic" lists of pollutants typically found in such stormwater. Mr. Jones did not review the design specifications of the "Vortechs" units, the City's two environmental impact statements, DEC's General Permit 93-06, or the letters from DEC and EPA concerning the treatment system. Mr. Jones was unaware of the Huck facility's spill containment system (*see* n.3, *supra*.). Nonetheless, Mr. Jones correctly perceived that the treatment system at the Park "will enhance stormwater runoff quality."

REASONS FOR DENYING THE WRIT

I.

THE ISSUES PRESENTED BY PETITIONERS HAVE NO IMPORTANCE BEYOND THE FACTS OF THIS CASE. THESE FACTS REMAIN IN SHARP DISPUTE, AND WERE NOT RESOLVED BY THE COURT BELOW. THE PETITION SHOULD BE DENIED.

All the issues presented by the petitioners turn on the particular facts of this matter, are of interest only to the parties to this case, and have no national importance. In support of their contrary view, petitioners offer only rhetorical abstractions regarding the "rule of law" and the allegedly "unique" nature of NEPA (Petition, pp. 5, 7).

Moreover, as set forth in our Statement of the Case, every fact germane to the petitioners' proposed questions and essential to petitioners' legal theories has been sharply contested by the City, and this factual dispute has not been resolved by either of the courts below. This Court has ruled that fact resolution is not a task to be served by a grant of certiorari. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). For this reason, the petition should be denied.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE QUESTION PRESENTED. THE PETITION MUST BE DENIED.

There is no conflict among the Circuit Courts on the NEPA issue presented. Indeed, the Second Circuit decision established no precedent. It held only that, when justified by the particular facts and an appellate court's view of its remedial alternatives, a NEPA case can become moot. This ruling is consistent with NEPA decisions of the Sixth, Seventh, Ninth and Tenth Circuits. Hence, the petition must be denied.

First, we note that the facts of the NEPA cases relied upon by petitioners have little in common with those of this matter. They involve: storage of nuclear waste, airport construction and operation, 191 high-voltage transmission towers, and a coal loading facility on the Mississippi River. By contrast, the project at issue here is a surface discharge of twice-treated stormwater from a building and parking lot.

The petition alleges that the Sixth, Seventh, Ninth and Tenth Circuits have established a uniform rule that NEPA cases are never rendered moot by the completion of the challenged federal agency action (Petition, Point I). This is incorrect. Each of these Circuits have dismissed appeals in NEPA cases on mootness grounds where, as here, the challenged action was completed during the pendency of the case. *See Neighbors Organized to Insure a Sound Environment, Inc. v. McArtor*, 878 F.2d 174, 178 (6th Cir. 1989); *South East Lake View Neighbors v. Department of Housing and Urban Development*, 685 F.2d 1027, 1039, n.9

(7th Cir. 1982) (dicta); *Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1987) (distinguishing *Columbia Basin Land Protection Ass'n. v. Schlesinger*, 643 F.2d 585 [9th Cir. 1981], relied upon by petitioners); and *Park County Resource Council, Inc. v. Department of Agriculture*, 817 F.2d 609, 614-615 (10th Cir. 1987), overruled on unrelated grounds, 956 F.2d 970, 973 (10th Cir. 1992).

This is to be expected. Mootness issues in a NEPA case, like those arising under any other federal statute, are decided, not by formula, but case by case, on the particular facts and circumstances involved. *See* the discussion and the many cases in Wright, Miller and Cooper, *Federal Practice and Procedure*, vol. 13A § 3533.3, pp. 261, 276 (1998 Supplement), 278 and 300 (West, 1984). As noted in Point I, above, the pertinent facts of this matter are in sharp dispute, and would have to be resolved by this Court before the question of mootness could even be reached. In these circumstances a grant of certiorari would be inappropriate.

There is no conflict in the Circuits, and the petition should be denied.

III.

THE CIRCUIT COURT'S DECREE WAS ISSUED ON AN APPEAL FROM AN INTERLOCUTORY ORDER. THE QUESTIONS PRESENTED BY PETITIONERS ARE NOT FUNDAMENTAL TO THE FURTHER CONDUCT OF THE CASE AND ARE NOT RIPE FOR REVIEW. THE PETITION SHOULD BE DENIED.

Petitioners seek to review a decree of the Circuit Court on an appeal from an interlocutory order, specifically, a denial of petitioners' motion for preliminary injunction. Further, the NEPA issues presented by petitioners are not fundamental to the further conduct of petitioners' remaining claims. This Court should await final judgment in the lower courts before considering an exercise of its certiorari jurisdiction. The petition should be denied.

Both the Circuit Court and the District Court opinions note that their orders were interlocutory in nature and that petitioners' claim against the City for compensatory damages was yet to be resolved. *See* the Circuit Court's opinion at (App. A, p. 7a) (petitioners "may perhaps be successful in obtaining other relief for their claimed harms . . . [b]ut only when such other relief is granted or denied . . . will the case become ripe for proper appellate review."). *See also* to the same effect, the District Court's Order at (App. B, p. 30a, n.12) (petitioners may "recover compensatory damages"). Resolution of the pending damage claim is in no sense dependent upon the NEPA issues presented in the petition since petitioners have not asserted a NEPA claim against the City.

In these circumstances, it is well established that a grant of certiorari is inappropriate. Indeed, the lack of finality in the order sought to be reviewed is itself sufficient ground for denial of the petition. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251 (1916); *American Construction Company v. Jacksonville, Tampa and Key West Railway Co.*, 148 U.S. 372 (1893); Stern, *et al.*, *Supreme Court Practice*, 7th Ed., § 4.18 (Bureau of National Affairs, 1993).

IV.

MOOTNESS ISSUES ASIDE, THE DISTRICT COURT'S DENIAL OF THE PRELIMINARY INJUNCTION WAS ENTIRELY PROPER AND LAWFUL.

Mootness issues aside, the District Court's denial of the motion for preliminary injunction was entirely proper and should not be disturbed. The District Court correctly held that petitioners had failed to prove their entitlement to preliminary relief.

The District Court succinctly and correctly set forth the appropriate standard for preliminary injunctive relief (App. B, p. 28a), and denied the petitioners' motion for failure to prove "probable irreparable harm" (*Id.*, pp. 28a-30a). The District Court also correctly found that petitioners'

> allegations of economic harm cannot support their motion for a preliminary inunction because economic harm, by its very nature, is redressable with monetary damages (*Id.*, n. 11, citation omitted).

The petitioners' focus in their motion papers on "economic" injury doomed their request for an injunction. Notably, there was no reference in the motion papers to alleged "environmental" injury; a reference which pervades their petition to this Court.

The District Court's denial of petitioners' motion was entirely proper and justified by the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 98-1527

IN THE

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THE CITY OF KINGSTON, NEW YORK, THE CITY OF KINGSTON PLANNING BOARD, THE CITY OF KINGSTON LOCAL DEVELOPMENT CORPORATION and THE UNITED STATES DEPARTMENT OF COMMERCE, FOR AND THROUGH THE ECONOMIC DEVELOPMENT ADMINISTRATION, WILBUR F. HAWKINS, DEPUTY ASSISTANT SECRETARY FOR ECONOMIC DEVELOPMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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FURTHER REASONS FOR GRANTING THE WRIT

NEPA specifically mandates that federal agencies may not rely upon local environmental decisionmaking in taking federal action. The federal government may not even defer to an Environmental Impact Statement compiled by a state agency, save a few itemized exceptions which bear indicia of critical analysis, none of which is present here. 42 U.S.C. § 4332(d).

Just as Respondent Department of Commerce deferred to the insular environmental analysis of the Kingston Respondents in derogation of NEPA[1] it now defers to their opposition before this Court. In so doing, there is no counterstatement of facts before this Court relating to the deficient federal action and decisionmaking.

The City of Kingston argues that the federally-funded sewer may not have a significant impact upon the Knaust Lakes, referencing materials that are not in the record below.[2]

---

1. No local environmental decision could be more preordained and unworthy of deference than that made here. The applicant for the Kingston Business Park project was the City of Kingston Local Development Corporation, through its president, T. R. Gallo. The local government that approved the project, rezoned the Business Park property from residential to manufacturing and authorized the sewer at issue here was the City of Kingston, through its Mayor, T. R. Gallo, the same man. These parties are represented jointly before this Court self-styled as the "Kingston Respondents."

2. The New York State Department of Environmental Conservation did not issue any permit for the sewer. The City's statement that it has "voluntarily elected" to comply with a stormwater permit is not in the record, nor does the Federal Clean

(Cont'd)

These arguments do not confront the central facts: The federal government declined to prepare an Environmental Impact Statement in support of its funding of the sewer and the Respondents moved quickly to build it while this case was pending, thus engineering the unique mootness finding below.

I. RESPONDENTS BRIEF IN OPPOSITION FAILS TO DISTINGUISH OR RATIONALIZE THE SIGNIFICANT SPLIT IN THE CIRCUITS

The teaching of the decision below is that federal agencies in the Second Circuit may ignore NEPA, take major federal action, and blaze ahead thus avoiding compliance and judicial review. Every other circuit that has confronted this direct behavior has declined to find mootness, if only because such a finding encourages lawlessness and derogates federal jurisdiction over a seminal federal environmental statute.

The Kingston Respondents dredge up a few old mining cases which have nothing to do with the current split in authority and are readily distinguishable. In *Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1987) plaintiffs belatedly sought relief against mining actions that were not only long completed, but irreversible. Distinguishing *Columbia Basin Land Protection v. Schlesinger*, 643 F.2d

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(Cont'd)
Water Act apply to subsurface discharges. 33 U.S.C. § 1362(7). *See Brief in Opposition*, pp. 5, and 4. Absolutely nothing in the record contradicts Mr. Rubin's report of a hydraulic connection between the sewer and the Knaust Lakes. Finally the record reflects that the maker of the "vortex" unit admits its limited, marginal utility and concedes that significant pollution bypasses the unit.

585 (9th Cir. 1981), cited in support of the Petition herein, the Ninth Circuit held that "(U)nlike a power transmission line, a completed mining operation cannot be moved. The impacts of the Plan mines are not remediable since we cannot order that the Plans be 'unmined' " (citations omitted).[3] *Accord*, *Park County Resource Council, Inc. v. Department of Transportation*, 817 F.2d 609 (10th Cir. 1987), *overruled on unrelated grounds*, 956 F.2d 970, 973 (10th Cir. 1992) (NEPA claim held moot when drilling at site abandoned, and reclamation of mine completed).[4]

Here, the storm sewer generates ongoing, daily pollution. A careful investigation of the environmental effects of the federal funding decision to build the sewer could avert or abate some, if not all of the pollution at issue. Indeed, the sewer could be diverted to the Hudson River, where the EDA first thought the sewer was going to go when it initially issued a Finding of No Significant Impact ("FONSI"). Moreover, the conflicting circuit decisions recognize that a violation of NEPA that is timely presented cannot become moot until NEPA compliance is achieved.

---

3. Notably, the *Sierra Club* court recognized that the decision in *Columbia Basin* represents, "the preeminent law with respect to mootness in a NEPA claim." 857 F.2d at 1318.

4. Respondent's reliance upon *South East Lake View Neighbors v. Department of Housing and Urban Development*, 685 F.2d 1027 (7th Cir. 1982) is also misplaced. That case specifically recognized that if, after construction and funding, a NEPA plaintiff "allege(s) the existence of the risk of a new environmental injury, whose appearance could be averted through a careful investigation of the environmental effects of the funding decision," the case is not moot. 685 F.2d at 1039. That is precisely this case.

II. THIS COURT HAS JURISDICTION

The assertion by the Kingston Respondents that the order below is interlocutory and thus beyond review is simply incorrect. The courts below fully decided this NEPA case on the merits and there is nothing more for the courts below to say about the NEPA claim or the Respondent United States Department of Commerce. Justice Scalia's decision denying the Petition for certiorari in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) is not to the contrary. There, the circuit court had remanded the case for a remedial determination. Here, the NEPA claim has been finally decided below. Therefore, unlike *Virginia Military*, the district court may make no further decision affecting the matters sought to be presented to this Court. The conflict which justifies this Court's review cannot be altered below, therefore this case should be heard.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully pray that this Court grant review in order to secure uniformity of decision and to provide strength and definition to NEPA, the cornerstone of federal environmental law.

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